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MEMORANDUM

TO: Redistricting Commission Members

FROM: Erin J. Ashbarry
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DATE: March 24, 2011

RE: **Legal Issues in Redistricting:**

1. **Traditional Districting Criteria**
2. **Substantially Equal Population: One Person, One Vote**
3. **The Voting Rights Act of 1965**
4. **Equal Protection Clause and Racial Gerrymandering**
5. **Equal Protection Clause and Political Gerrymandering**

This memo's purpose is to provide the Commission with a legal road map of its duties.[1] The County Charter's requirements for Council districts are terse: the Commission must create five districts that are (or review the present districts to assure they remain): (1) compact in form, (2) composed of adjoining territory, and (3) substantially equal in population.[2]

Council districts the Commission creates must also comply with federal laws mandating equality in voting: the 14th and 15th Amendments to the U.S. Constitution and the Voting Rights Act. The 14th Amendment's Equal Protection Clause mandates that electoral districts be of nearly equal population so that each person's vote has equal weight in the election of their representative.[3] The Equal Protection Clause also prohibits using race as the predominant factor

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[1] This memorandum is an update to one prepared by Edward Lattner, Associate County Attorney, for the Redistricting Commission in 2001.

[2] Section 103 of the Montgomery County Charter states: "Montgomery County shall be divided into five Council districts for the purpose of nominating and electing five members of the Council. Each district shall be compact in form and be composed of adjoining territory. Populations of the council districts shall be substantially equal."

[3] The Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution states, "no State shall . . . deny to any person within its jurisdiction the equal protection of the laws." *See also Voinovich v. Quilter*, 507 U.S. 146, 160-61 (1993).

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in districting to intentionally segregate voters based upon their race and lessen the weight of their vote.[4] The 15th Amendment of the U.S. Constitution also prohibits abridging the right to vote on the basis of race.[5] The Voting Rights Act, enacted in 1965 to enforce the 15th Amendment,[6] prohibits the denial, on the basis of race or color, of the equal opportunity to participate in the political process and elect candidates of their choice.

As you create the five districts that are compact in form, composed of adjoining territory, and substantially equal in population, you must be solicitous of the Voting Rights Act's prohibition against voting procedures have the purpose or effect of abridging the right to vote based on race, but mindful of the Equal Protection Clause's prohibition against intentionally segregating voters based upon race.

I. TRADITIONAL DISTRICTING CRITERIA: COMPACTNESS, CONTIGUITY, AND OTHERS

Over the years, the courts have identified a number of valid considerations when drawing districts. These include: (1) compactness, (2) contiguity, (3) respect for political subdivisions, (4) community shared interests, (5) geography, and even (6) avoiding contests between incumbents or protection of incumbency.[7] Two of these considerations are mandatory under our Charter: compactness and contiguity. These two factors are intended to prevent political gerrymandering.[8]

A. Compactness

When reviewing our Charter's compactness requirement, the Maryland Court of Special Appeals looked to cases construing an identical compactness requirement in the State Constitution.[9]

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[4] *See Bush v. Vera,* 517 U.S. 952, 959 (1996); *Shaw v. Reno*, 509 U.S. 630, 641-643 (1993).

[5] The Fifteenth Amendment states, ""The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

[6] *See In re Legislative Redistricting of the State*, 370 Md. 312, 326 n.8 (2002).

[7] *See Miller v. Johnson*, 515 U.S. 900, 916 (1995); *Abrams v. Johnson*, 521 U.S. 74, 98 (1997).

[8] *In re Legislative Districting*, 299 Md. 658, 675 (1982). The term gerrymander "was given birth in 1812 following a cartoonist's drawing of a Massachusetts legislative district that he described as appearing like a 'salamander.' An astute observer suggested that the district might more properly be described as a 'gerrymander' after then Governor of Massachusetts Eldridge Gerry who had a role, albeit a minor one, the construction of the district." *In re Legislative Districting*, 299 Md. at 676 n. 8.

[9] *Ajamian v. Montgomery County*, 99 Md. App. 665, 690 (1994). Art. III, § 4 of the Maryland Constitution requires that "[e]ach [state] legislative district shall . . . be compact in form."

> [T]he ideal of compactness, in geometric terms, is a circle, with the perimeter of a district equidistant from its center. With the possible exception of Colorado, however, no jurisdiction has defined or applied the compactness requirement in geometric terms. On the contrary, most jurisdictions have concluded that the constitutional compactness requirement, in a state legislative redistricting context, is a relative rather than an absolute standard.[10]

Compactness is a requirement for a close union of territory rather than a requirement dependent upon a district being of any particular shape or size. But it is subservient to the federal constitutional requirement of substantial equality of population among districts.[11]

B. Contiguity

Like our Charter, the State Constitution also has a contiguity requirement.[12] "The contiguity requirement mandates that there be no division between one part of a district's territory and the rest of the district; in other words, contiguous territory is territory touching, adjoining and connected, as distinguished from territory separated by other territory."[13]

Contiguity is also subservient to the federal constitutional requirement of equality of population among districts.[14]

II. SUBSTANTIALLY EQUAL POPULATION: ONE PERSON, ONE VOTE

The Equal Protection Clause of the Fourteenth Amendment requires that state and local districts assure that one citizen's vote is approximately equal in weight to that of every other citizen, also known as the "one person, one vote" principle. This means that the government must give each qualified voter an equal opportunity to participate in an election, "and when members of an elected body are chosen from separate districts, each district must be established on a basis that will ensure, as far as is practicable, that equal number of voters can vote for

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[10] *In re Legislative Districting*, 299 Md. 658, 676 (1982).

[11] *See In re Legislative Districting*, 299 Md. 658, 680 n.14 (1982).

[12] Art. III, § 4 of the Maryland Constitution states that "[e]ach [state] legislative district shall consist of adjoining territory."

[13] *In re Legislative Districting*, 299 Md. 658, 675 (1982).

[14] *See In re Legislative Districting*, 299 Md. 658, 680 (1982).

proportionally equal numbers of officials."[15]

Over time, the courts have established a formula for analyzing the "maximum population deviation" among districts for legislatively-enacted redistricting plans for state or local representatives.[16] The court first creates a hypothetical ideal district by dividing the total population[17] of the political unit (state, city, or county) by the total number of district-elected representatives who serve that population (in our case, that number is 5). Then the court adds together the percentage population variation of the largest and smallest district in comparison to the ideal district. If that figure is under 10% the court regards the difference as *de minimis* and is unlikely to find an Equal Protection violation. If that figure is over 10% the court regards the difference as presumptively invalid and the government must provide substantial justification to sustain the plan.[18] Finally, there is a level of population disparity beyond which the government can offer no possible justification. Although it is not clear precisely what that upper level is, the Supreme Court has stated that a maximum deviation of 16.4% "may well approach tolerable limits."[19]

The Commission should strive to create districts which meet the formula described above. In our case, the hypothetical ideal district is the total county population divided by 5. The sum of the percentage variation of the largest and smallest district in comparison to that ideal district should be under 10%.

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[15] *Hadley v. Junior College Dist. of Metro. Kansas City*, 397 U.S. 50, 56 (1970).

[16] The Supreme Court has repeatedly recognized that congressional apportionment plans, which are tested under Art. I, § 2 of the United States Constitution, are subject to stricter standards of population equality than are state or local legislative districting plans, which are tested under the Equal Protection Clause of the Fourteenth Amendment. *See Daly v. Hunt*, 93 F.3d 1212, 1216 n.5 (4th Cir. 1996). Court ordered apportionment plans must also meet more exacting standards. *See id.* at 1217 n.7

[17] The courts have often used total population as the pertinent measure rather than voting-age population. The use of total population advances "representational equality," ensuring "that all constituents, whether or not they are eligible to vote, have roughly equal access to their elected representatives to voice their opinions or otherwise to advance their interests." *Daly v. Hunt*, 93 F.3d 1212, 1223 (4th Cir. 1996). The use of voting age population advances "electoral equality," ensuring "that, regardless of the size of the whole body of constituents, political power, as defined by the number of those eligible to vote, is equalized as between districts holding the same number of representatives. It also assures that those eligible to vote do not suffer dilution of that important right by having their vote given less weight than that of electors in another location." *Id.*

[18] *See Daly v. Hunt*, 93 F.3d 1212, 1217-18 (4th Cir. 1996). Unlike a § 2 Voting Rights Act case (described below), the plaintiff need not demonstrate that the malapportionment actually lessened his ability to participate in the political process or to receive equally effective access to an elected representative. The harm is presumed in one person, one vote cases.

[19] *Mahan v. Howell*, 410 U.S. 315, 329 (1973).

III. VOTING RIGHTS ACT OF 1965

While creating districts substantially equal in population, the Commission must be aware of Section 2 of the Voting Rights Act of 1965,[20] which prohibits any law or practice which results in a denial or abridgement of the right to vote based upon race.[21] A plaintiff can establish a violation of Section 2 by proving that:

> **based on the totality of circumstances,** . . . the political processes leading to nomination or election in the . . . political subdivision are not equally open to participation by members of a [protected minority] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of [the minority] have been elected to office in the State or political subdivision is **one circumstance** which may be considered: Provided, That nothing in this section establishes a right to have members of a [minority] protected class elected in numbers equal to their proportion in the population.[22]

Taken as a whole, Section 2 "prohibits any practice or procedure that, 'interacting with social and historical conditions,' impairs the ability of a protected class to elect its candidate of choice on an equal basis with other voters."[23]

Opportunity is the touchstone under Section 2; the statute only protects the plaintiffs' right to equal opportunity or equal access to the political process.[24] It does not entitle any of the protected classes to be represented by a member of its own group.[25] Under the statute, no group

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[20] 42 U.S.C. § 1973. Another provision, Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, provides a mechanism to oversee proposed changes to districting schemes or electoral structures in "covered jurisdictions" — states or counties that had, as of certain dates, maintained voting "tests or devices" serving to disenfranchise minority voters. These are principally states from the Deep South, but also include Alaska and counties in New York and California. Montgomery County, Maryland is not a covered jurisdiction.

[21] Prior to a 1982 amendment, a plaintiff had to prove discriminatory intent. Now, a Section 2 plaintiff need not prove that the challenged law was enacted with a racially discriminatory intent, but only that the law has a discriminatory result. *Thornburg v. Gingles*, 478 U.S. 30, 43-44 (1986).

[22] 42 U.S.C. § 1973(b) (emphasis added).

[23] *Voinovich v. Quilter*, 507 U.S. 146, 153 (1993).

[24] *See Johnson v. De Grandy*, 512 U.S. 997 (1994).

[25] *Lodge v. Buxton*, 639 F.2d 1358, 1374 (5th Cir. 1982), *aff'd sub nom.*, *Rogers v. Lodge*, 458 U.S. 613, 624-26 (1982).

has a right to electoral victory.[26] In the same vein, the statute also does not entitle any group of persons to have their political clout maximized.[27]

The opportunity to participate in the political process is affected when a minority group's voice at the polls is diluted "either by the dispersal of [a minority group] into districts in which they constitute an ineffective minority of voters or from the concentration of [the minority group] into districts where they constitute an excessive majority."[28] Thus, plaintiffs may successfully challenge districting plans under Section 2 on the grounds that the district lines as drawn diluted their voting strength.[29]

As described below, courts interpreting Section 2 review many factors to analyze whether the right to equal opportunity or access to the political process is impaired.

A. The Three Preconditions to Suit Under Section 2 Of The Voting Rights Act

To establish a Section 2 violation, a minority group must establish the existence of three threshold conditions: 1) the minority group must be "sufficiently large and geographically compact to constitute a majority in a single-member district"; 2) the minority group must be able to show that it is "politically cohesive"; and 3) the majority "votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate."[30] The plaintiffs' failure to sustain their burden of proof on any one of these three factors is fatal to their case because, in their absence, the court cannot consider the structure or device being discharged to be the cause of the minority's inability to elect its preferred candidate.[31]

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[26] *See Whitcomb v. Chavis*, 403 U.S. 124, 153-55 (1971).

[27] *See Bartlett v. Strickland,* 2009 U.S. LEXIS 1842 28, 129 S. Ct. 1231, 1243 (2009); *Johnson v. De Grandy*, 512 U.S. 997 (1994).

[28] *Voinovich v. Quilter*, 507 U.S. 146, 154 (1993).

[29] *See, e.g, League of United Latin American Citizens v. Perry*, 548 U.S. 299 (2006) (finding portion of Texas redistricting plan violated Section 2 of Voting Rights Act because it diluted voting strength of minorities).

[30] *See also League of United Latin American Citizens v.* Perry, 548 U.S. 399, 425 (2006) (citing *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986)). Although these preconditions apply in cases which attack purely at-large, mixed at-large/district, and purely district systems, *Growe v. Emison*, 507 U.S. 25, 40 (1993), the proof will vary in each case. For example, with regard to the first factor, if plaintiffs are challenging the use of a multimember (at-large) district, they will have to show that "within each contested multimember district there exists a minority group that is sufficiently large and compact to constitute a single-member district." *Thornburg*, 478 U.S. at 50 n.16. On the other hand, plaintiffs challenging a single-member districting plan "might allege that the minority group is sufficiently large and compact to constitute a single-member district that has been split between two or more . . . single-member districts, with the effect of diluting the potential strength of the minority vote. *Id.*

[31] *See Thornburg v. Gingles*, 478 U.S. 30, 48-51 (1986).

B. The "Totality of the Circumstances" Test: Factors Reviewed by Courts to Decide Whether Members of a Minority Group Have Less Opportunity To Participate In The Political Process Than Others

A plaintiff's satisfaction of the three "necessary preconditions" does not, by itself, prove a Section 2 violation. Under the statute, a plaintiff still has the burden of proving, "based on the totality of circumstances," the challenged electoral practice or structure results in an electoral system that is not equally open to participation by members of the plaintiff's class. Plaintiff must show that members of plaintiff's class have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.[32] The statute itself identifies only "one circumstance which may be considered" -- the extent to which minorities are elected over time to determine whether a district plan prohibits participation by a group or class. Over time, in interpreting the Voting Rights Act, the Supreme Court has identified many other factors as relevant for a court to review in a Section 2 claim.

1. The Senate Factors

The Supreme Court reviews the following factors, identified by the Senate in 1982 when it amended Section 2, to determine whether a political process is open to participation by minorities:

1. Any history of discrimination touching the right to register, vote, or otherwise participate in the democratic process;

2. The extent of any racially polarized voting;

3. The use of any election devices (*e.g.*, majority vote requirements) which may lead to discrimination against minorities;

4. Evidence of exclusion of minorities from candidate slating procedures;

5. The extent to which the socioeconomic effects of past discrimination affect the ability of minorities to participate in the democratic process;

6. Whether campaigns have been characterized by overt or subtle racial appeal; and

7. The extent to which members of the minority group have been elected to public

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[32] *See Johnson v. De Grandy*, 512 U.S. 997, 1011-12 (1994).

office in the jurisdiction.

Two other factors with some "probative value" are:

1. Whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group; and

2. Whether the policy underlying the state or political subdivision s use of such voting qualification, pre-requisite to voting, or standard, practice or procedure is tenuous.[33]

There is no requirement that any particular number of factors be proved or that a majority of them point one way or another.

2. The Causation Factor

Courts may also consider evidence as to whether race-neutral reasons caused a lack of electoral success for minority groups. Courts have held that plaintiffs cannot prevail on a Section 2 claim if there is significant probative evidence that whites voted as a bloc for reasons unrelated to racial animus or racial antagonism (for example, party affiliation, organizational disarray, lack of funds, etc.).[34] In other words, a minority's lack of success in an election may be due to race-neutral reasons and not because of a lack of minority opportunity to participate that is the hallmark of a Section 2 violation.

3. The Proportionality Factor

Another relevant consideration is whether the number of districts in which the minority group forms an effective majority is roughly proportional to its share of the population in the relevant area.[35] Although "proportionality" or "rough proportionality" is not a "safe harbor" for defendants, the Supreme Court has recognized that it is a strong indication that minority voters have equal opportunity "to participate in the political process and elect representative of their choice."[36]

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[33] S. Rep. No. 417 at 28-29 (footnotes omitted), *reprinted in*, 1982 U.S. Code Cong. & Admin. News. (2d sess.) at 206- 207.

[34] *See Goosby v. Town Bd. of Town of Hempstead, N.Y.*, 180 F.3d 476, 493 (2d Cir. 1999); *Uno v. City of Holyoke*, 72 F.3d 973, 981-83 & 986-87 (1st Cir. 1995).

[35] *See League of United Latin American Citizens v. Perry*, 548 U.S. 399, 426 (2006).

[36] *See Johnson v. De Grandy*, 512 U.S. 997, 1019-20 (1994).

4. The "Packing" or "Cracking" of the Minority Vote

"Packing" and "cracking" can also be factors relevant to the "totality of the circumstances" analysis of a Section 2 claim. "Packing" occurs when politically cohesive minority voters are concentrated within a district to create a super-majority, in a situation where their numbers are large enough to constitute a majority to two or more districts. At the other end of the spectrum is "cracking" or "fragmenting;" this is when minority voters are spread out over several districts so they do not amount to a majority to any one district. Packing and cracking have legal significance in that they dilute the vote of minority voters and deprive them of the equal opportunity to participate in the political process and elect the candidates of their choice.[37]

IV. EQUAL PROTECTION CLAUSE AND RACIAL GERRYMANDERING

Where governments feel pressure under Section 2 to create majority-minority districts to ensure minority voters may elect a candidate on an equal basis with other voters, governments must be wary of the Equal Protection Clause's prohibition against intentionally segregating voters based upon race. The following rules have emerged through a series of Supreme Court cases.[38]

The government may consider race as a factor in districting, but it cannot be the predominant motivating factor. If race is the predominant motivating factor, the court will subject the plan to "strict scrutiny" and require the government to demonstrate a compelling government interest to support its predominant consideration of race. The government may subordinate traditional districting criteria (discussed above) to race only if there is a compelling governmental interest.

Compliance with Section 2 is a compelling governmental interest (allowing predominant consideration of race), but the government must have strong evidence that Section 2 liability is present. (In other words, the government must have strong evidence that a minority group could establish the three preconditions to a Section 2 violation and under the totality of the circumstances, their opportunity to participate is not equal to other groups.)

Even then, the government must narrowly tailor its plan — race may not be a predominant factor **substantially more than reasonably necessary to avoid Section 2 liability.** For example, districts must still be reasonably compact because Section 2 does not require the government to create districts that are not reasonably compact. On the other hand, a district

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[37] *See Voinovich v. Quilter*, 507 U.S. 146, 153-154 (1993).

[38] *See Hunt v. Cromartie*, 526 U.S. 541 (1999); *Shaw v. Hunt* (*Shaw II*), 517 U.S. 899 (1996); *Bush v. Vera*, 517 U.S. 952 (1996); *Miller v. Johnson*, 515 U.S. 900 (1995); and *Shaw v. Reno* (*Shaw I*), 509 U.S. 630 (1993).

created need not be the most compact (need not have the least amount of irregularity) to be least restrictive alternative.

V. EQUAL PROTECTION CLAUSE AND POLITICAL GERRYMANDERING

The Supreme Court has recognized that political gerrymandering may rise to the level of a deprivation of equal protection guaranteed by the Fourteenth Amendment to the U.S. Constitution.[39] But the burden on a plaintiff in such a case is very high. In order to prevail on such a claim, the plaintiff must demonstrate not only that the party that controlled the districting process (1) intentionally designed the apportionment plan so as to disadvantage the opposing party, but also that (2) there has been a disadvantage or actual discriminatory effect to the plaintiff party in that the challenged scheme effectively shut plaintiff's party out of the political process.[40] A single election result will not suffice to prove the second element of such a claim.[41]

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[39] *Davis v. Bandemer*, 478 U.S. 109, 127, 139 (1986); *Duckworth v. State Board of Elections*, 213 F.Supp.3d 543, 557 (D. Md. 2002).

[40] The Supreme Court's decisions on political gerrymandering are fraught with disagreement over whether constitutional challenges to political gerrymandering present a legal issue – or a "justiciable claim" – for the Court, or whether it is a "political question," or an issue best left for resolution by the political branch of government.

In 1986, the Supreme Court decided in *Davis v. Bandemer* that political gerrymandering could violate the equal protection clause of the 14th Amendment, but the portion of the opinion articulating the standards for review of a political gerrymander claim was a "plurality" opinion –only four of the nine justices agreed in the standards for a claim. *See Davis*, 478 U.S. at 127. Plurality opinions do not have the same binding effect as a decision issued with the support of the majority of the Court.

In 2004, Justice Scalia, writing what was again a plurality opinion, stated that *Davis v. Bandemer* should be overruled and that constitutional challenges to districting plans based upon claims of political gerrymander should not be heard by courts. *See Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004). Justice Scalia argued that the *Davis* standards under which a political gerrymandering claim could succeed were unmanageable in application: in the 18 years since the *Davis* case, no one successfully obtained judicial relief in a claim that a political gerrymander was unconstitutional. *See id.* at 280-81; *id.* at 306 (stating that *Davis* has resulted in 18 years of "essentially pointless litigation"). His opinion was not joined by a majority of the court and therefore does not have binding effect upon subsequent claims. *See Vieth,* 541 U.S. at 306.

Two years later, in 2006, the Court revisited the issue of political gerrymandering in another plurality opinion that found no constitutional violation due to alleged political gerrymandering. *See League of United Latin American Citizens v. Perry,* 548 U.S. 399, 423 (2006). A majority of the justices agreed in the finding of no constitutional violation, but a majority could not be reached as to the appropriate test to be applied in deciding whether a political gerrymander is unconstitutional. *See id.*

In the absence of majority agreement on the Supreme Court as to what standards apply in a political gerrymandering claim, the Commission should view the standards articulated in *Davis v. Bandemer* (intentional discrimination and inability to participate), as the appropriate test, as at least two Maryland federal district courts have used the *Davis* test to resolve claims of unconstitutional political gerrymander. *See Duckworth v. State Board of Elections*, 213 F.Supp.2d 543 (D. Md. 2002); *Marylanders for Fair Representation, Inc. v. Schaefer*, 849 F.Supp. 1022 (D. Md. 1994).

[41] *See Duckworth v. State Board of Elections*, 213 F.Supp. 2d 543, 556 (D. Md. 2002); *Marylanders for Fair Representation, Inc. v. Schaefer*, 849 F.Supp. 1022, 1038-43 (D. Md. 1994).

I will be happy to address any questions on these issues at the next meeting.

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